

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
TRAVELERS CASUALTY AND SURETY
COMPANY as Administrator for RELIANCE
INSURANCE COMPANY

Plaintiff,

vs

DORMITORY AUTHORITY - STATE OF NEW YORK,
TDX CONSTRUCTION CORP. and KOHN,
PEDERSON, FOX & ASSOCIATES, P.C.,

Defendants.

-----X
DORMITORY AUTHORITY OF THE STATE OF
NEW YORK AND TDX CONSTRUCTION CORP.,

Third-Party Plaintiff,

vs

TRATAROS CONSTRUCTION, INC.,

Third-Party Defendants,

-----X
TRATAROS CONSTRUCTION, INC. and
TRAVELERS CASUALTY AND SURETY
COMPANY,

Fourth-Party Plaintiffs,

vs

CAROLINA CASUALTY INSURANCE COMPANY,
BARTEC INDUSTRIES INC., DAYTON SUPERIOR
SPECIALTY CHEMICAL CORP., a/k/a DAYTON
SUPERIOR CORPORATION, SPECIALTY
CONSTRUCTION BRANDS, INC. t/a TEC, KEMPER
CASUALTY INSURANCE COMPANY d/b/a
KEMPER INSURANCE COMPANY, GREAT
AMERICAN INSURANCE COMPANY, NATIONAL
UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, P.A., UNITED STATES FIRE
INSURANCE COMPANY, NORTH AMERICAN

Case No. 07-CV-6915
(DLC)
ECF CASE

**ANSWER TO
AMENDED
FOURTH-PARTY
COMPLAINT WITH
CROSS-CLAIM AND
COUNTERCLAIM**

SPECIALTY INSURANCE COMPANY; ALLIED
WORLD ASSURANCE COMPANY (U.S) INC. f/k/a
COMMERCIAL UNDERWRITERS INSURANCE
COMPANY, ZURICH AMERICAN INSURANCE
COMPANY d/b/a ZURICH INSURANCE COMPANY,
OHIO CASUALTY INSURANCE COMPANY d/b/a
OHIO CASUALTY GROUP, HARLEYSVILLE
MUTUAL INSURANCE COMPANY (a/k/a
HARLEYSVILLE INSURANCE COMPANY, JOHN
DOES 1-20, and XYZ CORPS. 1-19,

Fourth-Party Defendants,

-----X

SIRS:

PLEASE TAKE NOTICE, that Fourth-Party Defendant, **BARTEC INDUSTRIES, INC.**, by it's attorneys, **O'CONNOR REDD LLP** as and for it's Answer to Fourth-Party Plaintiffs, Trataros Construction, Inc. and Travelers Casualty and Surety Company's Amended Fourth-Party Complaint, sets forth the following, upon information and belief:

As to a Response to Parties, Jurisdiction, and Venue

FIRST: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Amended Fourth-Party Complaint marked and designated "1", "2", "3", "5", "6", "7", "8", "9", "10", "11", "12", "13", "14", and "15".

SECOND: Admit as to the allegations in the paragraph of the Amended Fourth-Party Complaint marked and designated "4".

THIRD: Denies each and every allegation contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "16" and "17" and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact.

As to a Response to Interested Non-Parties

FOURTH: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraph of the Amended Fourth-Party Complaint marked and designated "18".

FIFTH: Denies the allegation contained in the paragraph of the Amended Fourth-Party Complaint marked and designated "19", and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact. Defendant further states that Crocetti is a necessary party.

Procedural Background

SIXTH: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Amended Fourth-Party Complaint marked and designated "20", "21", "22", "23", "24", "25", "26", "27", "28", "29" and "30".

Facts Common to All Counts

SEVENTH: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Amended Fourth-Party Complaint marked and designated "31", "32", "33", "34", "35", "36", "37", "38", "39", "40", "41", "42", "43", "44", "45", "46", "49", "53", "54", "55", "56", "57", "58", "59", "60", "61" and "62".

EIGHTH: Denies the allegation contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "47", "48" and "50", and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact.

Specifically refer to the contract for the terms specified therein.

NINTH: Admitted as to the allegations in the paragraphs of the Amended Fourth-Party Complaint marked and designated "51" and "52".

TENTH: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraph of the Fourth-Party Complaint marked and designated "53", "54", "55", "56", "57", "58", "59", "60", "61" and "62".

ANSWERING THE FIRST COUNT

(Contractual Indemnification & Exoneration against Bartec)

ELEVENTH: As to paragraph "63" of the Amended Fourth-Party Complaint, this answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "1" through "62" as if said denials were more fully and specifically set forth at length herein.

TWELFTH: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraph of the Fourth-Party Complaint marked and designated "64".

THIRTEENTH: Denies the allegation contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "65", "66", "67", "68", "69", "70", "71", and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact.

ANSWERING THE SECOND COUNT

***(Breach of Subcontract, Common-Law Indemnification,
Contribution & Exoneration against Bartec)***

FOURTEENTH: As to paragraph "72" of the Amended Fourth-Party Complaint, this answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "1" through "71" as if said denials were more fully and specifically set forth at length herein.

FIFTEENTH: Denies the allegation contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "73", "74", "75", "76", "77 and "78" and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact.

ANSWERING THE THIRD COUNT

***(Professional Negligence, Simple Negligence, Common-Law
Indemnification, Contribution, & Exoneration against Bartec)***

SIXTEENTH: As to paragraph "79" of the Amended Fourth-Party Complaint, this answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "1" through "78" as if said denials were more fully and specifically set forth at length herein.

SEVENTEENTH: Denies the allegation contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "80", "81", "82", "83", "84" and "85" and respectfully refers all questions of law to the Court and all questions of fact to

the trier of fact.

ANSWERING THE FOURTH COUNT

(Performance Bond Claim against Carolina Casualty by Trataros)

EIGHTEENTH: As to paragraph "86" of the Amended Fourth-Party Complaint, this answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "1" through "85" as if said denials were more fully and specifically set forth at length herein.

NINETEENTH: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Amended Fourth-Party Complaint marked and designated "87", "88" and "89".

ANSWERING THE FIFTH COUNT

(Performance Bond Claim against Carolina Casualty by Trataros)

TWENTIETH: As to paragraph "90" of the fourth-party plaintiffs, Amended Fourth-Party Complaint, this answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "1" through "89" as if said denials were more fully and specifically set forth at length herein.

TWENTY-FIRST: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Amended Fourth-Party Complaint marked and designated "91", "92", "93", "94", "95", "96" and "97".

ANSWERING THE SIXTH COUNT

***(Negligence, Breach of Contract, Breach of Warranty -
Indemnification, Contribution & Exoneration against Dayton Superior)***

TWENTY-SECOND: As to paragraph "98" of the Amended Fourth-Party Complaint, this answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "1" through "97" as if said denials were more fully and specifically set forth at length herein.

TWENTY-THIRD: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Amended Fourth-Party Complaint marked and designated "99", "100", "101", "102", "103", "104" and "105".

ANSWERING THE SEVENTH COUNT

***(Negligence, Breach of Contract, Breach of Warranty -
Indemnification, Contribution & Exoneration against TEC)***

TWENTY-FOURTH: As to paragraph "106" of the Amended Fourth-Party Complaint, this answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "1" through "105" as if said denials were more fully and specifically set forth at length herein.

TWENTY-FIFTH: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party Complaint marked and designated "107", "108", "109", "110", "111", "112", and "113".

ANSWERING THE EIGHTH COUNT

(Breach of Contract(s), Professional Negligence and/or Simple Negligence - Indemnification, Contribution & Exoneration against John Does 1-20 and YXZ Corps. 1-19)

TWENTY-SIXTH: As to paragraph "114" of the Amended Fourth-Party Complaint, this answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "1" through "113" as if said denials were more fully and specifically set forth at length herein.

TWENTY-SEVENTH: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Amended Fourth-Party Complaint marked and designated "115", "116", "117", "118", "119", "120", "121" and "122."

ANSWERING THE NINTH COUNT

(Insurance Coverage - Declaratory Judgment, Indemnification, Contribution & Exoneration against Kemper, Great American, National Union, US Fire, Allied World, Zurich, Ohio Casualty, Harleysville, and XYZ Corps. 1-19)

TWENTY-EIGHTH: As to paragraph "123" of the Amended Fourth-Party Complaint, the answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Amended Fourth-Party Complaint marked and designated "1" through "122" as if said denials were more fully and specifically set forth at length herein.

TWENTY-NINTH: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party Complaint

marked and designated "124", "125", "126", "127", "128", "129", "130", "131", "132", "133", "134", "135", "136", "137", "138", "139", "140", "141", "142", "143", "144", "145", "146", "147", "148", "149", "150" and "151".

AS AND FOR A FIRST SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

THIRTIETH: Any injuries and/or damages sustained by the Fourth-Party Plaintiff, as alleged in the Fourth-Party Plaintiff's Amended Complaint herein, which this answering fourth-party defendant denies, were caused, in whole or in part, by the contributory negligence and/or culpable conduct of the other parties including the Fourth-Party Plaintiff and not as a result of any negligence and/or culpable conduct on the part of this answering Fourth-Party defendant.

AS AND FOR A SECOND SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

THIRTY-FIRST: Upon information and belief, the injuries and damages, if any, allegedly sustained by the Fourth-Party Plaintiff as alleged in the Amended Complaint were caused by third parties other than this answering defendant and, by reason of the foregoing, the Amended Complaint should be dismissed as to this answering defendant.

AS AND FOR A THIRD SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

THIRTY-SECOND: The causes of action set forth in the Amended Complaint fail to state a claim upon which relief can be granted.

AS AND FOR A FOURTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

THIRTY-THIRD: A necessary or indispensable party has not been joined and, therefore, the action should not proceed and should be dismissed.

AS AND FOR A FIFTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

THIRTY-FOURTH: Pursuant to the provisions Article 16 of the CPLR, should this answering fourth-party defendant be found liable for damages, such liability being 50 percent or less of the total liability assigned to all persons liable, the liability of this answering fourth-party defendant for non-economic loss shall not exceed its equitable share determined in accordance with the relative culpability of all parties liable.

AS AND FOR A SIXTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

THIRTY-FIFTH: The provisions, requirements, and terms of CPLR Article 16, §1601, *et. seq.* apply to the action and non-compliance with such provisions, requirements or terms operates to vitiate Fourth-Party Plaintiff's right to maintain the subject action, and any verdict Fourth-Party Plaintiff may recover thereby.

AS AND FOR A SEVENTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

THIRTY-SIXTH: The negligence of a third person or entity over whom this answering fourth-party defendant had no control was a superseding cause and insulates the answering fourth-party defendant from liability.

AS AND FOR A EIGHTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

THIRTY-SEVENTH: Fourth-Party Plaintiff failed to exercise ordinary care to effect a cure and to prevent aggravation of the alleged injury and damages.

AS AND FOR A NINTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

THIRTY-EIGHTH:: Fourth-Party Plaintiff is estopped from recovering from the answering defendant by reason that the Fourth-Party Plaintiff and/or its agent examined and inspected the Conflow and other materials received by it and thereafter accepted

such goods and confirm that said goods met the specifications required by Fourth-Party Plaintiff and that it was satisfactory to Fourth-Party Plaintiff for its particular purposes as required by Fourth-Party Plaintiff.

**AS AND FOR A CROSS-CLAIM AGAINST DEFENDANTS, DORMITORY
AUTHORITY, TDX KOHN, CAROLINA CASUALTY INSURANCE COMPANY,
DAYTON SUPERIOR SPECIALTY CHEMICAL CORP., a/k/a DAYTON SUPERIOR
CORPORATION, SPECIALTY CONSTRUCTION BRANDS, INC. t/a TEC, KEMPER
CASUALTY INSURANCE COMPANY d/b/a KEMPER INSURANCE COMPANY,
GREAT AMERICAN INSURANCE COMPANY, NATIONAL UNION FIRE
INSURANCE COMPANY OF PITTSBURGH, P.A., UNITED STATES FIRE
INSURANCE COMPANY, NORTH AMERICAN SPECIALTY INSURANCE COMPANY
ALLIED WORLD ASSURANCE COMPANY (U.S) INC. f/k/a COMMERCIAL
UNDERWRITERS INSURANCE COMPANY, ZURICH AMERICAN INSURANCE
COMPANY d/b/a ZURICH INSURANCE COMPANY, OHIO CASUALTY INSURANCE
COMPANY d/b/a OHIO CASUALTY GROUP, HARLEYSVILLE MUTUAL
INSURANCE COMPANY (a/k/a HARLEYSVILLE INSURANCE COMPANY,
JOHN DOES 1-20, and XYZ CORPS. 1-19**

THIRTY-NINTH:: If Fourth-Party Plaintiff sustained any injuries or damages as alleged in the Amended Fourth-Party Complaint, which this answering fourth-party defendant denies, then such injuries or damages were caused by reason of the culpable conduct, acts or omissions, negligence, strict products liability, statutory violation, breach of contract, obligation or warranty of the co-defendants above-named.

By reason of the foregoing, this answering fourth-party defendant is entitled to indemnification or contribution from, and to have judgment against the co-defendants above-named, for all part of any verdict or judgment that Fourth-Party Plaintiff may recover against this answering Fourth-party Defendant.

**AS AND FOR A FULL AND COMPLETE COUNTERCLAIM AGAINST
FOURTH-PARTY PLAINTIFFS, TRATAROS CONSTRUCTION, INC. and
TRAVELERS CASUALTY AND SURETY COMPANY,**

FORTIETH: That if the Fourth-Party Plaintiffs herein recovers a judgment against the Fourth-Party defendants, said judgment will have been caused and brought about by the primary negligence of the said fourth-party plaintiffs in that the Fourth-Party Plaintiffs conducted themselves in such a manner as to cause the accident and damages complained of and was otherwise negligent in the premises and was guilty of breaches of duty and/or warranty and/or contract which duties were imposed by statute and/or agreement and/or implied in laws and without any negligence or breach of any duty by this answering Fourth-Party Defendants whose negligence, if any, was secondary in nature so that if said fourth-party plaintiff should have determination of ultimate responsibility and judgment over and against the said Fourth-Party Plaintiffs, for the same amount or such proportionate amount of any said judgment and damages as the Fourth-Party Plaintiffs are found to have caused or be responsible for together with all costs of investigation expenses, attorneys' fees, costs and disbursements incurred in the defense of this action and in the conduct of the counterclaim.

WHEREFORE, this answering Fourth-party Defendant demands judgment as follows:

- (A) Dismissing the Fourth-party Plaintiffs, Fourth-Party Complaint as against this answering Fourth-party Defendant together with the costs and disbursements of this action;

In the alternative and, in the event fourth-party plaintiffs prevail, this answering Fourth-party Defendant demands judgment determining the respective percentages on the part of the plaintiffs and the defendants, Third-Party Plaintiffs, Third-Party Defendants, Fourth-Party Plaintiffs and Fourth-Party Defendants, thereby reducing the amount of the damages as against this answering fourth-party defendant by the respective percentage of fault;

This answering Fourth-Party Defendant further demands that in the event said answering Fourth-Party Defendant is found liable to Fourth-Party Plaintiffs herein, then said answering Fourth-Party Defendant, on the basis of apportionment of responsibility, have judgment over and against the aforementioned defendants and third-party co-defendants and third-party plaintiffs and fourth-party co-defendants, for all or part of the verdict or judgment that fourth-party plaintiffs may recover against said answering fourth-party defendant, pursuant to Dole v. Dow Chemical, together with the costs and disbursements of this action for any expenses incurred by fourth-party defendant in defense thereof, including attorneys' fees and other costs herein.

And for judgment over and against the defendants and fourth-party co-defendants and each of them, on the cross-claim, for all or part of any liability assigned to this answering Fourth-Party Defendant.

Dated: White Plains, New York
June 26, 2008

Yours, etc.

O'CONNOR REDD LLP

By:


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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
TRAVELERS CASUALTY AND SURETY
COMPANY as Administrator for RELIANCE
INSURANCE COMPANY

Plaintiff,

vs

DORMITORY AUTHORITY - STATE OF NEW YORK,
TDX CONSTRUCTION CORP. and KOHN,
PEDERSON, FOX & ASSOCIATES, P.C.,

Defendants.

-----X
DORMITORY AUTHORITY OF THE STATE OF
NEW YORK AND TDX CONSTRUCTION CORP.,

Third-Party Plaintiff,

vs

TRATAROS CONSTRUCTION, INC.,

Third-Party Defendants,

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TRATAROS CONSTRUCTION, INC. and
TRAVELERS CASUALTY AND SURETY
COMPANY,

Fourth-Party Plaintiffs,

vs

CAROLINA CASUALTY INSURANCE COMPANY,
BARTEC INDUSTRIES INC., DAYTON SUPERIOR
SPECIALTY CHEMICAL CORP., a/k/a DAYTON
SUPERIOR CORPORATION, SPECIALTY
CONSTRUCTION BRANDS, INC. t/a TEC, KEMPER
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KEMPER INSURANCE COMPANY, GREAT
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UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, P.A., UNITED STATES FIRE

Case No. 07-CV-6915
(DLC)
ECF CASE

CERTIFICATION

INSURANCE COMPANY, NORTH AMERICAN
SPECIALTY INSURANCE COMPANY; ALLIED
WORLD ASSURANCE COMPANY (U.S) INC. f/k/a
COMMERCIAL UNDERWRITERS INSURANCE
COMPANY, ZURICH AMERICAN INSURANCE
COMPANY d/b/a ZURICH INSURANCE COMPANY,
OHIO CASUALTY INSURANCE COMPANY d/b/a
OHIO CASUALTY GROUP, HARLEYSVILLE
MUTUAL INSURANCE COMPANY (a/k/a
HARLEYSVILLE INSURANCE COMPANY, JOHN
DOES 1-20, and XYZ CORPS. 1-19,

Fourth-Party Defendants,

-----X

THIS IS TO CERTIFY that the foregoing **ANSWER TO AMENDED FOURTH-PARTY COMPLAINT WITH CROSS-CLAIM AND COUNTERCLAIM** was forwarded, via first class mail, postage prepaid, on this 9 th day of ~~July~~ 2008, to the following:

PLEASE REFER TO SERVICE LIST

JEREMY D. PLATEK (JP 9153)
Attorney at Law

Travelers Casualty and Surety Co. V. Dormitory Authority - State of N.Y., et al.
United States District Court, Southern District of New York
Civil Action No.: 07-CV-6915

SERVICE LIST

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